

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL SEDLAK)	
Claimant)	
VS.)	
)	Docket No. 175,444
ALL FREIGHT SYSTEMS)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

On April 17, 1997, the application of claimant for review by the Workers Compensation Appeals Board of the Review & Modification Award of Administrative Law Judge Bruce E. Moore dated October 31, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Chris Miller of Lawrence, Kansas. The respondent and its insurance carrier appeared by and through their attorney, C. Stanley Nelson of Salina, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether the Administrative Law Judge erred in his computation of claimant's earnings after January 1, 1995.

- (2) Whether the Administrative Law Judge erred in finding that claimant's award should be reduced.
- (3) Whether claimant's attorney is entitled to additional attorney fees for defending the respondent's Application for Review and Modification before this Board, and if so, the amount of those fees.
- (4) Respondent raises the issue regarding the nature and extent of claimant's injury and/or disability subsequent to respondent's Application for Review and Modification.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was originally granted an award by the Workers Compensation Appeals Board based upon a 61 percent work disability and based upon an average weekly wage of \$496.21. This decision was handed down January 7, 1994. In February 1994, claimant purchased a semitrailer truck and returned to truck driving. On October 14, 1994, respondent filed an application for review and modification of the award alleging claimant's work disability had diminished.

A significant dispute presented to the Administrative Law Judge on review and modification centered around the income derived by claimant from his truck driving business which began in February 1994, approximately two months after the award of the Appeals Board. The analysis by the Administrative Law Judge of the complicated income records provided by claimant is well set out in the Review & Modification Award. The Appeals Board, in evaluating the evidence, adopts the findings of the Administrative Law Judge indicating that claimant has shown an ability to earn an average weekly wage of \$524.49 per week subsequent to January 1, 1995. A key element in the dispute over claimant's post-award wage earning ability is the depreciation expense on claimant's truck. For the calendar year 1994 the claimant deducted the entire amount of the cost of the truck from his income, resulting in no income to claimant for the year 1994. Claimant contends that he is entitled to consider the depreciation expense on the truck as a reduction in his actual income for the year 1995 also. The Appeals Board disagrees. Claimant is not entitled to depreciate the cost of the truck in 1995 after deducting the entire cost of the truck in 1994.

Here, the claimant has displayed an ability to earn more than the average weekly wage that he was earning at the time of injury, subsequent to January 1, 1995. In considering the claimant's current work disability, orthopedic surgeon C. Reiff Brown, M.D., in examining claimant after February 1994, found that claimant's overall physical condition had improved significantly with an increased range of motion. He did not, at that time, object to claimant driving a truck 8½ hours a day. Thus, claimant's access to the open labor market had changed considerably as a result of his renewed ability to return to driving as an over-the-road trucker. The Appeals Board finds that claimant's post-award work disability has changed significantly. Dr. Brown found that claimant's overall physical condition had improved significantly to the point where claimant was capable of driving a truck 8½ hours

a day. There were no restrictions placed upon claimant which would prohibit him from earning full wages comparable to those he was earning at the time of the original injury. The action by the claimant, wherein he purchased a truck and began driving again approximately two months after the Appeals Board's decision of January 7, 1994, is additional support for the conclusion that claimant can engage in work for wages comparable to the gross average weekly wage he was earning at the time of the injury. The presumption contained in K.S.A. 1990 Supp. 44-510e that the claimant has no work disability if he engages in work for wages comparable to the gross average weekly wage he was earning at the time of the injury became applicable as of January 1, 1995, at which time claimant would be limited to his functional impairment. The evidence originally presented to the Administrative Law Judge reveals claimant's functional impairment to be in a range of 7 to 18 percent based on the testimonies of Dr. Brown and William A. Bailey, M.D. In considering the opinions of both physicians, the Appeals Board finds claimant's functional impairment to be 12.5 percent to the body as a whole and claimant is granted an award based upon said finding.

Counsel for claimant requested an award of "reasonable attorney's fees" for services rendered to claimant subsequent to the ultimate disposition of the initial and original claim pursuant to K.S.A. 44-536. Counsel for the claimant advised the Appeals Board by letter of April 22, 1997, that his request for attorney fees for services rendered to claimant during the appeal to the Appeals Board had been withdrawn and was no longer an issue before the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review & Modification Award of Administrative Law Judge Bruce E. Moore dated October 31, 1996, should be, and is hereby, modified and an award is granted in favor of the claimant, Michael Sedlak, and against the respondent, All Freight Systems, and its insurance carrier, Travelers Insurance Company, for a 12.5 percent whole body functional disability.

Effective January 1, 1995, claimant's original Award is modified and thereafter claimant is entitled to 202.14 weeks of permanent partial disability at the rate of \$41.36 per week, totaling \$8,360.51. As of August 8, 1997, claimant would be entitled to 135.86 weeks of permanent partial disability compensation at the rate of \$41.36 per week, totaling \$5,619.17, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 66.28 weeks of permanent partial disability compensation at the rate \$41.36 per week, in the amount of \$2,741.34 until fully paid or until further order of the Director.

The issue regarding attorney fees for claimant's counsel has been withdrawn.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Braksick Reporting Service
Deposition of Michael Sedlak

\$146.00

Dated October 31, 1994

Owens, Brake, Cowan & Associates	
Review & Modification Hearing Transcript	\$344.70
Dated January 10, 1996	
Deposition of Dr. C. Reiff Brown	\$148.55
Dated February 19, 1996	
Total	\$639.25

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
C. Stanley Nelson, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director